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DIVISION II

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STATE OF WASHINGTON

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NO. 47171-G-II

COURT OF APPEALS, DIVISION II OF
THE STATE OF WASHINGTON

IN RE PERSONAL RESTRIANT OF

COREAN OMARUS BARNES,

Petitioner.

CLALLAM COUNTY SUPERIOR COURT CAUSE NO.08-1-00340-9

THE HONORABLE JUDGE KENNETH WILLIAMS

PETITIONER'S REPLY BRIEF

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FIRST GROUND

THE TRIAL COURT VIOLATED MR. BARNES' RIGHT TO DUE PROCESS BY GIVING A JURY INSTRUCTION FOR CONSENT OVER HIS OBJECTION FOR FIRST DEGREE BURGLARY AND UNLAWFUL IMPRISONMENT.

The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. U.S.C.A. Const. Amend. XIV; Art. 1 sec. 3 .IN RE WINSHIP, 397 u.s. 358, 361-64, 90 s.ct. 1068, 25 L.Ed.2d 368(1978). Criminal defendants are presumed innocent and the government must prove guilt beyond a reasonable doubt. Implicit in the principle that due Process requires the State to prove every element beyond a reasonable doubt is the requirement that the jury instructions list all of the elements of the crime. the Due Process Clause protects the accused in a criminal case against conviction except upon proof of every fact necessary to constitute the crime with which he is charged. STATE V. KJORSVIK, 117 wash.2d 93, 101, 812 p.2d 86(1991); STATE V. PHUONG, 174 Wn.App. 494, 299 p.3d 37(2013). "Elements" are the constituent parts of a crime, usually consisting of the actus reus, mens rea, and causation, that the prosecution must prove to sustain a conviction. Black's Law Dictionary 559 (8th Ed. 2004) "if a reviewing court finds that the state did not prove an element of the crime, reversal is required." IN RE MARTINEZ, 171 Wn.2d 354, 256 p.3d 277(2011).

In order for the State to prove First Degree Burglary as defined in RCW 9A.52.020 on the basis of an Assault committed therein, the State had to show that Mr. Barnes (1) Entered and Remained Unlawfully (2) With an intent to commit a crime against a person and (3) Assaulted any person. (that Person being Ms. Russell) STATE V. DOW, 162 Wash.App. 324, 253 p.3d 476 (2011); STATE V. HICKMAN, 135 Wn.2d 97, 954 p.2d 900(1998); STATE V. SMITH, 155 Wn.2d 496, 120 p.3d 559 (2005). Under the "Essential Elements" rule a charging document must allege facts supporting every element of the offense and crime charged. U.S.C.A. Const. Amend. VI; Art. 1 sec. 22.

STATE V. LEACH, 113 wash.2d 679, 689, 782 p.2d 552(1989); STATE V. GREATHOUSE, 113 Wash.App. 889, 56 p.3d 569 (2002); STATE V. WASHINGTON, 135 Wn.App. 42, 48, 143 p.3d 606 (2006).

In the present case before this Honorable Court Mr. Barnes was convicted of Two counts of Rape in the Second Degree, First Degree Burglary(with Sexual Motivation), and Unlawful Imprisonment. The State has no longer met it's burden to prove that Mr. Barnes committed the crime of Burglary or Unlawful Imprisonment. In order for the burglary conviction to stand there has to be an Assault that is the an essential element. In this case the Assault element of the Burglary was the now Reversed/Dismissed Second Degree Rapes which was the only Assaults alleged. This Honorable Court reversed the Rape convictions in light of the recent rulings in Lynch and Coristine because the Trial Court gave an Affirmative Defense instruction for Consent over Mr. Barnes' objection. This consent instruction was given for not only the Rape Counts but also for The counts of Burglary and Unlawful Imprisonment because the Trial Court said that Consent was an element of all of the charges. RP 487. The Respondents would have this Honorable Court to believe that the misleading consent jury instruction that was given for each count was only prejudicial to the rape counts and not the Burglary and Unlawful Imprisonment and under Washington Law that even if an instruction is misleading it will not require reversal unless prejudice is shown. However, when a jury instruction is incorrectly presented to the jury and is given as a part of the case prejudice is presumed when the error is of constitutional magnitude and violates Due Process. U.S.Const.Amend. XIV. STATE V. W.R.JR.,179 Wn.2d 1001, 315 p.3d 531 (2014). The Consent instruction was given as it pertain to the Assault component of the Burglary. It was also given as an element of Unlawful Imprisonment(See Exhibit II). Defense Counsel objected to the consent instruction as well as argued that with the burden of proof regarding consent and the shifting of the consent instruction as it relates to the Assault component of burglary was not made clear. The mis-instruction on consent regarding the rape charges would or could have confused or mislead the jury on the burden of proof regarding consent relative to the burglary charge. As well as the Unlawful Imprisonment. RP. 465-468, 485-492.

The respondent' claims that the "Faulty" Consent instruction was previously addressed in the direct appeal but neglect to point out that it was never addressed in regards to the Burglary and Unlawful Imprisonment counts. The respondent cannot have it both ways. At first they claim that the consent instruction did not pertain to the Burglary and Unlawful Imprisonment counts but they next argue that any error that occurred with the consent instruction was clearly harmless error with respect to the Burglary and Unlawful Imprisonment counts. This argument by the respondent does nothing but confuse the issues that has been put before this Honorable Court. (See Brief of Respondent Footnote Pg.11). Moreso the Respondent has not shown how this constitutional error was harmful to the Rapes but harmless to the Burglary and Unlawful Imprisonment. Mr. Barnes has provided this Honorable Court with evidence to show that 121 Victoria View in Sequim, Wa. was in fact his legal residence at the time of the alleged Rape and that under Washington Landlord-Tenant Law he had a legal right to be inside of the residence that he resided in with Mr. Johnson. See RCW 59.04.020; 59.18.200; 59.20.700. Mr. Johnson testified that Mr. Barnes cease to stop living with him either the middle or the end of August. RP.306 So one could assume that at the time of the alleged Rap inside the Victoria View residence that Mr. Barnes still legally by state law lived there. If this Honorable Court were to address the evidence submitted in regards to the Burglary Mr. Barnes would like to note for this Honorable Court that the evidence now provided as exhibits by Mr. Barnes were not readily available before trial and that Washington Law allows for proceedings outside the record to be submitted in a Personal Restraint Petition. Also the jury at the time of trial only had Mr. Johnson's testimony to aid their decision in regards to the Burglary Count and had the jury had the exhibits that are now presented a different verdict may have been rendered for that count. Furthermore, the Respondent fail to address how the Assault Element in the Burglary and Unlawful Imprisonment counts are no longer applicable with the Rape Counts now being Reversed / Dismissed. The only Assault that were presented to the jury have now been dismissed and with a key element gone the Burglary can not stand with only two of the elements that is needed to prove that crime. To allow such is a violation of Mr. Parnes' rights to Due Process and Equal Protection. U.S.C.A. XIV.

UNLAWFUL IMPRISONMENT

To be guilty of Unlawful Imprisonment the defendant must have known of every fact necessary to constitute a "Restraint." That is the defendant must know that he or she is (1) Restricting the victims movements (2) Without the victims Consent (3) Without Legal Authority and (4) In a manner that substantially interferes with the victims liberty. A restraint that is merely incidental to the commission of another crime does not constitute kidnapping and probably does not constitute Unlawful Imprisonment. STATE V. GREEN, 94 Wn.2d 216, 227, 616 p.2d 628, 635 (1980); STATE V. WARFIELD, 103 Wn.App. 152, 5 p.3d 1280 (2000). For purposes of establishing that the crime of Unlawful Imprisonment has occurred, a substantial interference with the victims liberty is a real or material interference with the liberty of the victim as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict. RCW 9A.40.010(1) STATE V. WASHINGTON, 135 Wn.App. 42, 143 p.3d 606 (2006). "The presence of a means of escape may help to defeat a prosecution for Unlawful Imprisonment." STATE V. THOMAS, 71 Wash. App. 634, 643, 861 p.2d 492 (1993); STATE V. JOHNSON, 172 Wn. App. 112, 297 p.3d 710 (2012).

In the present case before this Honorable Court the trial court gave the Consent jury instruction for Unlawful Imprisonment and later ruled that the conviction merged with the Rape conviction but with the reversal and dismissal of the Rape counts the Unlawful Imprisonment conviction cannot stand. RP 466-67, 485-87, 490, 564. This Honorable Court ruled that giving the consent instruction over Mr. Barnes' objection was reversal error however that same jury instruction applied to not just the Rape Counts but to all of the counts. The jury had to find that Mr. Barnes (1) Restrained the movements of Christina Russell, in a manner that substantially interfered with her liberty; (2) That such restraint was (a) without Christina Russell's Consent or (b) accomplished by physical force, intimidation, or deception, and (3) That such restraint was without legal authority. (See Jury Instruction in Exhibit II). The Consent Jury Instruction was given because Consent is an element of the crime charged. Mr. Barnes objected to the instruction as a whole not just

for the Rape counts but for all counts. Furthermore, the State at Mr. Barnes' sentencing hearing conceded that the crime of Unlawful Imprisonment merged with the predicate offenses and as such one cannot stand without the other. RP 564 The convictions for Burglary and Unlawful Imprisonment should be reversed also because they are intimately connected with the other now reversed / dismissed rapes. See STATE V. CLAFLIN, 38 Wn.App. 847, 690, p.2d 1186 (1984); STATE V. DAVIS, 177 Wn.App. 454, 31 p.3d 1278 (2013); STATE V. KIER, 164 Wash.2d 798, 803, 194 p.3d 212 (2008); STATE V. PHUONG, 174 Wn. App. 494, 299 p.3d 37 (2013). Moreover, the State in their brief on direct appeal stated "That it does not believe that the "Hostage Holder" exception applies to these facts." (See Exhibits) A "Hostage Holder" is someone that commits the crime of Unlawful Imprisonment however with this statement by the State one could assume that Mr. Barnes should not have been charged with the Crime of Unlawful Imprisonment.

Because the Trial Court gave a Consent Jury Instruction over the defense' objection for not only the Rape counts but for the Burglary and Unlawful Imprisonment counts as well it is Respectfully requested of this Honorable Court to Reverse and Remand back to the Trial Court for a new trial and / or dismissal with prejudice. Despite the respondents assertion Mr. Barnes' has shown the his constitutional rights have been violated and as such an actual and substantial prejudice has been presented to this Honorable Court. Stated another way, with the reversal of the rape counts the Assault is not longer there which is a key element for the First Degree Burglary charge and That Christina Russell did not Consent when it came to the crime of Unlawful Imprisonment. A jury instruction that has constitutional violation implications can never be consider as harmless error when the error is prejudicial.

SECOND GROUND

MR. BARNES RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAIL TO PROPERLY ARGUE HOW THE CONSENT JURY INSTRUCTION GIVEN OVER HIS OBJECTION PERTAIN TO NOT ONLY THE RAPE COUNTS BUT THE BURGLARY AND UNLAWFUL IMPRISONMENT COUNTS AS WELL.

The Sixth Amendment right to Effective Assistance of Counsel applies equally to both Trial and Appellate Counsel. U.S.C.A. Const. Amend. VI. GIDEON V. WAINWRIGHT, 372 u.s. 335, 344, 83 s.ct. 792, 9 L.Ed.2d 799 (1963). The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the Effective Assistance of Counsel on his first appeal as a right. U.S.C.A. Const. Amend. XIV; EVITTS V. LUCEY, 469 u.s. 387, 396, 105 s.ct. 830, 83 L.Ed.2d 821 (1985).

To establish Ineffective Assistance of Appellate Counsel, A petitioner must establish that (1) Counsel's performance was deficient and (2) The deficient performance actually prejudice the defendant. "An attorney's error during an appeal on direct review may provide cause to excuse a procedural default; For if the Attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claim." U.S.C.A. Const. Amend. VI; MARTINEZ V. RYAN, 132 s.ct. 1309 (U.S. 2012); HUFF V. U.S., 734 F.3d 600 (C.A.6(ohio)2013). An Attorney's performance is deficient if "Counsel's representation fell below an objective standard of reasonableness." The petitioner must show " that counsel made errors so serious that counsel was not functionary as the counsel guaranteed by the Sixth Amendment." STRICKLAND V. WASHINGTON, 466 u.s. 668, 104 s.ct. 2052 (u.s. Fla.1984); IN RE MORRIS, 176 Wn.2d 157, 288 p.3d 1140 (2012).

In the present case before this Honorable Court Mr. Barnes' Appellate counsel fail to properly argue how the jury instruction for Consent not only applied to the Rape counts but also the Burglary and Unlawful Imprisonment which was objected to by Trial Counsel. Mr. Barnes and Trial Counsel Alex Stalker tried on multiple occasions to point this Constitutional error out to Appellate Counsel but was ignored and as such caused Mr. Barnes to receive a mixed opinion. Appellate Counsel Ms. Lise Ellner not only ignored this but fail to properly present the issues that were preserved for Appellate review. Despite the many efforts by Trial Counsel and Mr. Barnes, Ms. Ellner fail to provide this Honorable Court with meritorious issues that prejudice Mr. Barnes in such a way that his rights to Due Process were substantially violated.(See Exhibit III that's Attached).

"Appellate Counsel who files a merits brief need not, and should not, raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success on appeal; However it is possible to bring a Strickland claim based on counsel's failure to raise a particular claim, though it is difficult to demonstrate that Counsel was incompetent, and generally, only when ignored issues are clearly stronger than those presented, will the presumption of Effective Assistance of Counsel be overcome. U.S.C.A. Const. Amend. VI; XIV. To prevail on a claim of Ineffective Assistance of Appellate Counsel, the petitioner must demonstrate the merit of any legal issue Appellate Counsel raised inadequately or failed to raise and also show that he or she was prejudiced. IN RE PINK, 322 p.3d 790 (2014).

Mr. Barnes' Appellate Counsel fail to properly argue how the trial court shifted the burden as well as provided a misleading jury instruction over defense counsel's objection. Broadly speaking the only underlying "assault" alleged were the now reversed / dismissed rapes. Had Ms. Ellner properly reviewed this issue this Honorable Court would have been able to review how the Consent instruction was applied as a whole and not just in part. This issue was presented to Ms. Ellner by Trial Counsel but she consistently ignore him. (See Declaration attached herein). The presumption of adequate performance is overcome when there is no conceivable legitimate tactic explaining counsel's performance. Mr. Barnes' Appellate Counsel fail to properly present every Constitutional argument after such was pointed out to her by Trial Counsels Harry Gasnick and Alex Stalker of the Clallam County Public Defenders Office. (See Exhibit III and Attachment). Due to Ms. Ellner' failure to properly litigate these issues Mr. Barnes was denied his Constitutional Right to Effective Assistance of Appellate Counsel. U.S.C.A. Const. Amend. VI.

CONCLUSION

It is Respectfully Requested of this Honorable Court to Grant this petition and Reverse Mr. Barnes' Burglary and Unlawful Imprisonment conviction. Mr. Barnes has presented to this Honorable applicable evidence to show that he (1) Had a legal right under Washington's Landlord Tenant Law to be at the residence of 121 Victoria View in Sequim, Wa on August 15, 2008; (2) That A Key Vital Element in the

Burglary count has been removed with the reversal / dismissal of the Rape Counts; (3) That the Consent Jury Instruction that was given over the Defense' objection applied to all the counts and not just the Rape Counts; and (4) The Mr. Barnes recieved Ineffective Assistance of Appellate Counsel when she fail to properly present every Constitutional argument even after it was pointed out to her.

I Corean Barnes declare under the penalty or perjury that the above is true and correct on this 19 day of June, 2015 at Stafford Creek Corr. Cntr.

Corean O. Barnes- 317817

[Signature]

Subscribed and Sworn to before me this 19 day of June, 2015

[Signature]

Notary Public in and for the State of Wa.

Residing in Aberdeen, Wa.

My Comm. Expires 6/6/18



CERTIFICATE OF SERVICE

I certify that I ~~sent~~ e-mailed
1 copies of Reply
to J. Morris / J. Espinoza
& [Signature]
Date 7/6/15 Signed [Signature]

EXHIBIT I FOR BURGLARY ARGUMENT

NO. 12

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse, there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a charge to which the defense of consent is raised.

NO. 14

To convict the Defendant of the crime of BURGLARY IN THE FIRST DEGREE as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 15, 2008, the Defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building, the Defendant assaulted a person; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NO. 16

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not an assault, if it is done with the consent of the person alleged to be assaulted. As to the crime of assault, the State has the burden to prove the absence of consent beyond a reasonable doubt.

1 ~~hand down my pants and put finger into vagina, very~~
2 uncomfortable. Eventually I was able to push door
3 open --

4 MS. LUNDWALL: I think there was testimony
5 showing she was physically resisting at that point
6 and she was not consenting. It was not like she was
7 saying no passively, she was actively trying to get
8 away when this was occurring.

9 I don't think there's sufficient testimony on
10 the record for it to be inferred that she passively
11 accepted this.

12 THE COURT: All right, well, I will take a
13 closer look at that one. Now let's go to count 2
14 which we'll assume is the Victoria View.

15 MS. LUNDWALL: It's RR and VV if you want to
16 do abbreviations.

17 THE COURT: It would appear to me again that in
18 this case that the -- to the extent that consent is
19 an affirmative defense, that instruction should be
20 given. My thought is if it is given it should be
21 revised to indicate that it's a defense where the
22 issue of consent is raised and add that language to
23 it to make sure it's not a defense if the issue of
24 consent is not raised. And I have not looked
25 carefully at the Lynch and all that.

1 As I briefly read Lynch it appears to indicate
2 that instruction should be given when that is a
3 defense.

4 MR. GASNICK: And the problem is, well, um,
5 and cases -- Gregory case particularly reference --
6 and the materials that were given to the Court from
7 the Lynch briefing highlight this, um, when we have
8 consent as an affirmative defense with a certain
9 burden of proof on this one charge, and as the
10 Court's noted the lack of consent is the essential
11 element in 2 of the other charges that are before
12 this jury, so when the Court phrases it well, one
13 talks about consent being an issue here's what the
14 burden is, it's not going to be the burden -- it's
15 not an affirmative defense in burglary one and
16 unlawful imprisonment. In fact, it's an essential
17 element that the State has to -- that the absence of
18 consent is something that the State has to disprove
19 or the absence of consent is something the State has
20 to establish beyond a reasonable doubt for both of
21 those crimes. That's why frankly I'm sure -- I'm
22 sure that the people who sit on court's of appeal
23 and Supreme Court are smart enough to readily
24 understand why that's not a problem. I'm not that
25 smart. And frankly, I fret about a jury's ability

1 to be able to make those kinds of distinctions as
2 well.

3 THE COURT: Would you agree that the if consent
4 is raised as a defense, that it is an affirmative
5 defense to a charge of rape in the second degree?

6 MR. GASNICK: We agree that that's how the law
7 is currently structured and we disagree that that is
8 good law.

9 THE COURT: Okay. Is your client offering a
10 consent instruction?

11 MR. GASNICK: Um, Your Honor has the
12 instructions that we are proposing. We are not -- we
13 are not -- we would not be offering a consent
14 instruction that included an affirmative defense.
15 That included a burden that included placing the
16 burden of proof on the Defendant.

17 THE COURT: Okay.

18 MS. LUNDWALL: I think --

19 THE COURT: Ms. Lundwall?

20 MS. LUNDWALL: My suggestion is I think I may
21 have brought it up earlier, that we just specify as
22 to the consent being an affirmative defense that it
23 applies only to count 2, and we can use the normal
24 consent definition and specify that it applies to
25 the definition of assault and unlawful imprisonment

1 ~~as part of the instructions at least to clarify any~~
2 confusion that might go out with having 2 separate
3 instructions.

4 THE COURT: I will take a look at that. It
5 appears to me that one of the other issues then is
6 the burden of proof instruction submitted by the
7 State does not contain the statement the Defendant
8 has no burden of proving any reasonable doubt
9 exists.

10 MR. GASNICK: It's in the one I submitted.

11 THE COURT: My question was was that
12 intentional, because there's going to be a Defendant
13 -- because the Defendant does have some burden of
14 proving a defense of consent.

15 MS. LUNDWALL: No, that was a type-o and I
16 don't have an object -- I think it's a good idea for
17 appellate review to include the language, usually I
18 would catch that. I apologize, Your Honor.

19 MR. STALKER: I guess I just mention in
20 reviewing the transcript and I discussed this with
21 Mr. Gasnick, the reason noticed it -- he noticed it
22 as being an alteration of it, I noticed it because
23 it was mentioned in the transcript last time that
24 that was missing from the proposed instructions.

25 THE COURT: I think it was done intentionally

1 I did give the lesser included on burglary in
2 the first degree. What I did in instruction number
3 16 is I had that as to the crime of assault which
4 consent is a defense, again -- actually it's an
5 element, lack of consent is an element, and I have
6 added the language that says the State has the
7 burden of proof to prove the lack of consent beyond
8 a reasonable doubt in the definition of assault. And
9 again, I gave the lesser included of trespass in the
10 first degree on that one the -- I think the other
11 instructions are all fairly traditional. I did --

12 MR. GASNICK: Absence of consent is also an
13 element in unlawful imprisonment.

14 THE COURT: It is, but it also spells out in
15 the to convict that the State must prove the absence
16 of consent, so that clearly can be argued that
17 that's an element, that the State has to prove that
18 there was no consent.

19 I gave the Petrich instruction on unlawful
20 imprisonment and the concluding instruction. So
21 that's how we got to where I got on these. So I
22 don't know if the parties want to comment at all at
23 this point?

24 MS. LUNDWALL: I was able to find case law
25 that says criminal trespass is a lesser included.

1 ~~The case I found was a burglary second degree but it~~
2 appears there's really not that kind of distinction.

3 The State has no exceptions to the
4 instructions as the Court has compiled them.

5 THE COURT: Okay. I won't necessarily make you
6 take formal exceptions at this point. Mr. Stalker?

7 MR. STALKER: I'm actually ready, I have
8 compiled a list. First I would object to all
9 references of Christina Russell as CR. She was
10 named I believe in the probable cause statement.
11 She's provided and spelled her name during
12 testimony. I think putting CR in there if anything
13 only tends to put some sort of inference that the
14 Court or the process believes she's a victim and
15 needs to be protected more than anyone else in this
16 case. So I would object to that.

17 I did notice one mistake, number 27, that is
18 the order in which you are to consider things,
19 incorrectly identifies there being 7 verdict forms.
20 I assume that's a hold over from the Defense -- it's
21 on the first page, last paragraph, you will be given
22 exhibits admitted into evidence and 7 verdict forms
23 A, B, C, D, E, which seems to be a hold over from
24 the original verdict form.

25 I'd object to a lack of instruction on rape 3.

1 I think the tape is basically a third source of
2 evidence, and if the jury were so inclined to
3 believe they had sufficient evidence to basically
4 disbelieve what the 2 people had said and reach some
5 sort of middle ground, so I think the rape 3
6 instruction would be appropriate -- as well as lack
7 of injury. So I think rape 3 would be appropriate
8 on both Count 1 and 2.

9 Object to the lack of instruction that mere
10 penetration without more, it's not physical force
11 that overcomes resistance, especially given the lack
12 of a rape 3 instruction. I don't know that that's
13 clear.

14 I'd object to instruction number 12, forcing
15 consent instruction on us when it's not requested
16 and the evidence regarding consent basically would
17 be relevant as to whether or not there was forcible
18 compulsion.

19 Additionally, I know the Court has said they
20 took some precautions since it's pretty much an
21 element of all of the charges here, but I think
22 frankly it's going to be extremely confusing to a
23 jury when what happened, who's (sic) burden it is,
24 and who has to prove consent when.

25 So, I'd object to instruction number 12.

1 I object to the lack of an instruction
2 defining what consent is. And I object to a lack of
3 instruction basically indicating forcible compulsion
4 can't be based solely on a subjective reaction to
5 particular conduct and requires something else.

6 THE COURT: Okay. Ms. Lundwall, as to the
7 naming Ms. Russell?

8 MS. LUNDWALL: We -- well, at this point we've
9 always used initials when we've dealt with person's
10 name in sex cases. It does not seem to be
11 inflammatory or prejudicial. I am aware of no case
12 law that says that at this point she is actually
13 mistakenly named in the PC affidavit. We move the
14 Court to redact her name and would replace it with
15 her initials.

16 MR. STALKER: Well, to keep doing that then, to
17 not give any special weight, I ask we replace all
18 references of the Defendant with CB.

19 MS. LUNDWALL: The Defendant is actually not
20 in -- considered inflammatory named, I'm the
21 Plaintiff, he's the Defendant.

22 THE COURT: Well, I will take a look at that
23 issue. As to the issue of defining forcible
24 compulsion, it appeared that definition applies
25 primarily when you give the rape in the third degree

1 - instruction.

2 Again, I don't think the jury is going to have
3 any difficulty in determining that forcible
4 compulsion which overcomes resistance -- I mean, you
5 can -- I suppose if you were hyper-technical you
6 could argue that's from the mere physical standpoint
7 being more than the laws of physics.

8 MR. STALKER: I was going to mention for
9 example as resistance --

10 THE COURT: I don't think the jury's going to
11 be confused by that at all. The instruction might
12 actually confuse them more, especially in light of
13 some of the other counts, frankly. I'm not going to
14 give that. I don't think it's necessary. And just
15 as I didn't give the State sort of explanation of
16 what a body part is, it would include a finger, I
17 don't think it's necessary. I don't think the
18 jury's going to be troubled. I think each of you
19 will have, frankly with these instructions, an
20 opportunity to argue fully your theory of the case.

21 I'm going to look at the initials issue and I
22 will correct the concluding instruction.

23 MR. GASNICK: And Your Honor, there was one
24 other issue that the Defense wished to raise by way
25 of exception. On the burden shifting of the consent

1 under the rape 2 statute, I'll incorporate by
2 reference the briefing that has been submitted to
3 the Court already, but, uh, just in addition to that
4 I would note that the particular charges in this
5 case, um, Mr. Stalker's referenced the confusion
6 that they generate -- that's generated. I think
7 also highlights the fundamental problems with the
8 existing case law.

9 We now have a circumstance where for the rape
10 2 we have instructions that there's a burden on the
11 Defendant to prove consent by a preponderance of the
12 evidence for the -- for a burglary one where the --
13 this alleged rape 2 is in essence the assault
14 element of the burglary one. The State has to prove
15 the absence of consent. So what this -- so it's
16 entirely possible given these weird -- these
17 contradictory, frankly, burdens of proof and
18 reference consent that a jury under this set of
19 instructions can say, um, that a person -- that the
20 Defendant didn't meet his burden of proof regarding
21 consent on the rape 2 therefore he's guilty of that,
22 but the State didn't meet its burden regarding lack
23 of consent on the burglary one and acquit him of
24 that. And what I will -- I certainly don't have a
25 problem with my client getting acquitted of a

1 burglary, that would certainly be an inconsistent
2 verdict possibility of which exists by virtue of
3 these inconsistent standards. And that's fundamental
4 and core to the problem that's generated by this
5 burden shifting which is a large part of why we
6 contend it to be unconstitutional.

7 THE COURT: Okay. And I do understand that,
8 however, the explanation which you just gave in
9 2 minutes could be one given to the jury and
10 explained very carefully, how they need to rule on
11 them, certainly can be argued to them. If we end up
12 with inconsistent verdict it may mean the jury did
13 not understand. Certainly the argument can be made
14 to them and if they carefully read the instructions,
15 I think it's clear who has the burden on particular
16 issues. Case law seems to be very clear if the
17 Defendant raises the issue of consent on a rape
18 charge, the Court is required to instruct the jury
19 on what the proper burden is in that case. That's
20 -- there was some hint from Division 2 that they
21 didn't like that burden but if they were compelled
22 to follow the Supreme Court's law as well as
23 certainly I'm in no better position than Division 2.

24 MR. GASNICK: We're not disputing that's what
25 the case law maintains.

1 THE COURT: I understand.

2 MR. GASNICK: We maintain that it's bad or
3 wrong case law.

4 THE COURT: And I understand that.

5 MS. LUNDWALL: Regarding the State's motion to
6 redact the victim's name from the probable cause
7 affidavit, if that was -- if her information was
8 given, it was done inadvertently. It's our policy
9 to name the victims by initials and limit their
10 exposure to the community as a matter of public
11 policy.

12 MR. STALKER: It's been published out there for
13 4 and a half, 5 years.

14 MS. LUNDWALL: Better late than never is all I
15 can say.

16 THE COURT: I will take a look at that and have
17 instructions ready for the jury, and to the extent
18 that there's further exceptions you want to take,
19 you can do that Monday morning.

20 MS. LUNDWALL: Okay.

21 THE COURT: All right. And I -- just to let
22 you know, I do have the resets on Monday morning.
23 It looks like there's 4 or 5 of them to reset, so it
24 may be well after 9:15 before we get going to the
25 jury.

VI. IDENTIFICATION OF THE DEFENDANT

(If no SID complete a separate Applicant card (form FD-258) for State Patrol

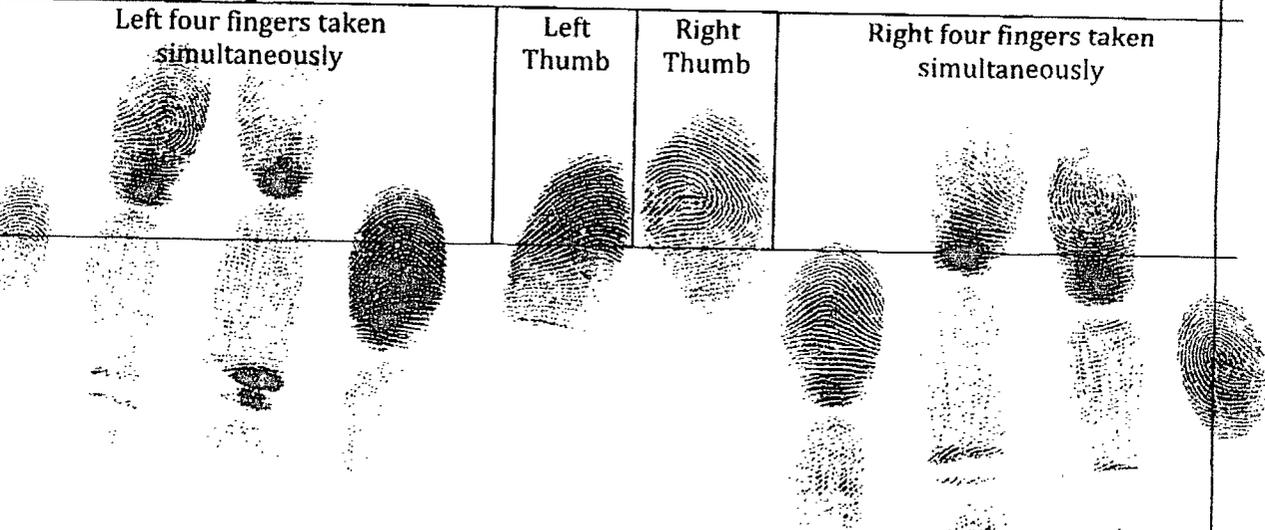
SID No.	WA22113507	Date of Birth	11/12/1982
FBI No.	8209KB0	Local ID No. (pick one):	<input checked="" type="checkbox"/> WA0050000 (CCSO) <input type="checkbox"/> WA0050100 (PAPD) <input type="checkbox"/> WA0050200 (Forks PD) <input type="checkbox"/> WA0050300 (Sequim PD) <input type="checkbox"/> WAWSP8000 (WSP)
PCN No.	966012871	OCA	08-08578
Alias name, DOB:	a/k/a Corgano Barnes, Cantrell Barnes, Lonney M. Barnes, Roosevelt Barnes, Roosevelt Times, Gerard Barnes, Lonnie Barnes, Kentrall Lear. DOB: 11/12/1982, 5'11", 228 lbs., brown eyes, black hair		
LKA:	121 Victoria View, Sequim, Washington 98382		

Race:	<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian	Ethnicity:	<input type="checkbox"/> Hispanic	Sex:	<input checked="" type="checkbox"/> Male
	<input type="checkbox"/> Native American	<input type="checkbox"/> Other: _____			<input checked="" type="checkbox"/> Non-Hispanic		<input type="checkbox"/> Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court: _____ Deputy Clerk. Dated: _____, 2015

The defendant's signature: 



FELONY JUDGMENT AND SENTENCE (FJS) (Prison)
 (Sex Offense and Kidnapping of a Minor Offense)
 (RCW 9.94A.500, .505)
 (WPF CR 84.0400 (07/2013))

CLALLAM COUNTY
 PROSECUTING ATTORNEY
 Clallam County Courthouse
 223 East Fourth Street, Suite 11
 Port Angeles, Washington 98362-3015
 (360) 417-2301 FAX 417-2469

SCANNED - 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff.

VS.

Corean Barnes

Defendant

NO. 08-1-00340-9

MINUTE ORDER
(OR)

FILED
CLALLAM COUNTY

APR 22 2015

9:09 hr

BARBARA CHRISTENSEN CLERK

The court having reviewed a motion for entry of an order, hereby enters the following:

Based upon motion of the state dated March 16, 2015, the court hereby dismisses without prejudice Count I, Rape in the second degree, and Count II, Rape in the second degree.

This order is nunc pro tunc effective March 18th, 2015

Dated this 22nd day of April, 2015.

Christophe Mey
Judge

[Signature]
Attorney

Atty # 46147

[Signature] 38677
Attorney

Atty#

MINUTE ORDER
OR.DOC

X [Signature]



Record Certification: I Certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control. Clallam County Clerk, by _____ Deputy # pages: _____

EXHIBIT II FOR UNLAWFUL IMPRISONMENT ARGUMENT

NO. 22

A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force.

The offense is committed only if the person acts knowingly in all these regards.

NO. 23

To convict the Defendant of the crime of UNLAWFUL IMPRISONMENT as charged in Count IV, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 15, 2008, the Defendant restrained the movements of Christina Russell. in a manner that substantially interfered with her liberty;
 - (2) That such restraint was
 - (a) without Christina Russell's consent or
 - (b) accomplished by physical force, intimidation, or deception, and
 - (3) That such restraint was without legal authority;
 - (4) That, with regard to elements (1), (2), and (3), the Defendant acted knowingly;
- and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), and (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

1 that would be appropriately applied for the offender
2 score. And again, I calculate a 4. Last time we
3 got a 3, I'm not sure what was different.

4 MR. STALKER: I think my understanding in
5 looking at the record last time is the Court
6 determined that the unlawful imprisonment was the
7 same course of conduct as the rest of -- the State
8 argued then as it did in this case that basically
9 the entire series of events was the unlawful
10 imprisonment. I think on that basis the Court
11 correctly concluded it was the same course of
12 conduct.

13 THE COURT: Ms. Lundwall, do you want to argue
14 that issue?

15 MS. LUNDWALL: I'm not going to argue that
16 issue. It would basically -- the unlawful
17 imprisonment would merge with one or both of the
18 rapes under the circumstances.

19 THE COURT: Okay.

20 MS. LUNDWALL: There was the issue of
21 basically there was a long time ago and I believe it
22 was a possession of stolen property that went into
23 diversion that I don't think was ever revoked that
24 -- and I am not even sure what to do with that at
25 that particular point.

her will at the camper, penetrated against her will at Mr. Johnson's residence, and held at the Mr. Johnson's residence for the purpose of sexual assault.

~~Mr. Barnes alleges the trial court incorrectly applied the "hostage holder" exception to the recording. The State cannot find any such ruling. In any event, this deputy of the State does not believe the "hostage holder" exception applies to these facts. The statute permits law enforcement to record communications with a hostage holder. Even though the jury found that Mr. Barnes unlawfully imprisoned C.R., the recording was not made during a hostage situation.~~

ISSUE TWO

When the facts of the case show that the victim was dragged from her car to a camper and penetrated and then dragged from a couch to a bed, screaming all the time that she did not want to have sex with Mr. Barnes, did the trial court err when it refused to give an instruction about third degree rape.

There is simply nothing in the record that would support an instruction for third degree rape, i.e., that C.R. simply did not consent to sexual intercourse.

Standard of Review: A defendant is entitled to a jury instruction

EXHIBIT III FOR INEFFECTIVE ASSISTANCE ARGUMENT

CLALLAM PUBLIC DEFENDER

516 EAST FRONT STREET
PORT ANGELES, WA 98362
(360) 452-3307
FAX (360) 452-3329

HARRY D. GASNICK
Director

JOHN F. HAYDEN
SUZANNE M. B. HAYDEN
JONATHAN P. FESTE
LOREN D. OAKLEY
ALEX R. STALKER
DOUGLAS J. KRESL
CHARLIE COMMERE
Staff Attorneys

August 4, 2014

Corean O. Barnes, DOC # 317817
(Legal Mail)
Airway Heights Correction Center
P.O. Box 1899
Airway Heights, WA 99001-1899

RE: State of Washington v Corean Barnes
Clallam County Cause No. 08-1-00340-9

Dear Mr. Barnes,

This is a follow-up to our 7/30/14 conversation. Ms. Ellner has confirmed she is not representing you any further and that I may talk to you.

My office does not currently represent you or do we do appeal or PRP work. If your case is sent back to Superior Court for retrial or resentencing, I expect Clallam Public Defender will be reappointed to assist you.

You did however seek my input on using the possibility of further post-conviction (appeal or PRP) action by you as leverage toward obtaining a credit for time served negotiation.

The biggest legal impediment to that is your burglary 1^o conviction. That conviction included a finding of sexual motivation, therefore your sentence in that charge even on resentencing following appeal would be an indeterminate sentence with a maximum of life in prison.

If you choose to pursue further review therefore, to get the result you seek, you will need to successfully challenge the burglary conviction. I will defer to Ms. Ellner's assessment that there is no merit to further pursuing the issues on the burglary that you have already raised on appeal and lost.

The question is one of whether the rape conviction reversal based on the Lynch decision gives rise to alternative, previously unexplored appeal issues which were addressed in your letter of about 6/30/14.

We discussed 2 such issues. They were similar but distinct from each other. Both issues related to the "assault" that would have been a necessary finding for the burglary conviction.

Broadly speaking, a burglary 1^o conviction requires unlawfully entering or remaining in a residence while assaulting someone.

The first issue we discussed would be that in your case, the only underlying "assaults" alleged were the (now reversed) rapes. From that premise you may wish to argue that since the rape convictions were reversed, and the alleged assault(s) upon which the burglary conviction relied; the burglary conviction must also be reversed.

Another issue we discussed related to the burden of proof regarding consent. In your case the rape convictions were reversed because the court improperly put the burden of proof on you to make you prove consent, instead of making the State prove lack of consent. In the Court's instructions regarding the burglary, the court addressed the issue of "consent" in the context of the assault component of burglary. We discussed whether it could be that because the burden of proof regarding consent as relates to the assault component of burglary was not made clear, the mis-instruction on consent regarding the rape charges would have confused/misled the jury on the burden of proof re: consent relative to the burglary charge.

Per your request, I am asking Ms. Ellner, by copy of this letter, to send you copies of the jury instructions that were given in your trial.

Very truly yours,

CLALLAM PUBLIC DEFENDER



HARRY D. GASNICK
Director

HDG/drr

cc: Lisa Ellner

Law Offices of Lise Ellner P.O. Box 2711 Vashon, WA 98070

December 11, 2014

Delivered via U.S. Postal Service

Corean Barnes DOC# 317817
Washington Corrections Center
Airway Heights CC
PO Box 2049
Airway Heights, WA 99001
Legal Mail

Re: State v. Barnes SUP. CT. 08-1-00340-9; NO. COA NO. 44075-0-II

Mr. Barnes:

Please find enclosed a copy of the mandate. This formally ends my representation. I will keep your file for one year, thereafter it will be destroyed.

Sincerely,



Lise Ellner
Attorney at Law
Encl.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 44075-0-II
)	
vs.)	AFFIDAVIT OF COUNSEL
)	IN SUPPORT OF NOTICE OF
)	INTENT TO WITHDRAW
COREAN BARNES,)	
)	
Appellant.)	
_____)	

Lise Ellner, being first duly sworn, deposes and says:

That I am the attorney for the above named indigent appellant and that:

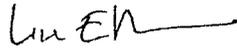
1. The appellant was sent a copy of the mandate issued in the above noted case.
2. The appellant was sent a closing letter advising of termination of the direct review process and the right to request files from counsel.
3. The appellant was advised of the right to petition pro se for review to the Supreme Court.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



LISE ELLNER January 21, 2015
Seattle, WA

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office appeals@lewiscountywa.gov; and Corean Barnes DOC# 317817 Airway heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on January 21, 2015. Service was made by electronically to the prosecutor and to Mr. Barnes by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

Law Offices of Lise Ellner P.O. Box 2711 Vashon, WA 98070

January 21, 2015

Delivered via U.S. Postal Service

Corean Barnes DOC# 317817
Washington Corrections Center
Airway Heights CC
PO Box 2049
Airway Heights, WA 99001
Legal Mail

Re: State v. Barnes SUP. CT. 08-1-00340-9; NO. COA NO. 44075-0-II

Mr. Barnes:

I have enclosed your entire paper file. Other documents in electronic format will not be sent. I have also enclosed my withdrawal as counsel in your case.

Sincerely,



Lise Ellner
Attorney at Law
Encl.

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2
3 STATE OF WASHINGTON)
4 : ss.
5 COUNTY OF CLALLAM)

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DECLARATION OF COUNSEL

I, Alex Stalker, make the following declaration regarding the matter of *State v. Corean Barnes*, originally 08-1-00340-9, and on direct appeal 44075-0-II:

Mr. Barnes was charged on August 21st, 2008 with two counts of Rape in the Second Degree, Burglary in the First Degree with Sexual Motivation, Unlawful Imprisonment, and two counts of Harassment – Threats to Kill. After a mistrial and a later jury trial, Mr. Barnes was ultimately convicted of two counts of Rape in the Second Degree, and Unlawful Imprisonment. The jury hung on the count of Burglary in the First Degree with Sexual Motivation.

Mr. Barnes’ original convictions were reversed and remanded in an unpublished decision in *State v. Barnes*, 2010 Wash. App. LEXIS 2248, 157 Wn. App. 1076 (2010). After his case was reversed and the Clallam Public Defender was reappointed to represent him, I was assigned to represent Mr. Barnes in approximately April of 2011. Harry Gasnick, director of the Clallam Public Defender assigned himself as second chair.

Mr. Barnes went to trial in September 2012. Harry Gasnick and I represented Mr. Barnes at trial. Mr. Gasnick, aside from supervising the trial in general, was in charge of jury instructions for the defense and objections to the State’s proposed jury instructions. Mr. Gasnick made an oral presentation during which he made detailed objections to the State’s proposed instruction that consent was an affirmative defense that Mr. Barnes had to establish by a preponderance of the evidence. Mr. Gasnick’s oral presentation borrowed heavily from the trial brief of another attorney in our office, Loren Oakley, who raised this issue in the trial

1 of *State v. Lynch*, 09-1-00253-2 which was later reversed on appeal in *State v. Lynch*, 178
2 Wn.2d 487, 309 P.3d 482 (2013) on this precise issue.

3 The jury convicted Mr. Barnes of both counts of Rape in the Second Degree, Burglary
4 in the First Degree with Sexual Motivation, and Unlawful Imprisonment. Mr. Barnes was
5 sentenced October 16th, 2012, and an appeal was filed the same day. The trial court signed an
6 order that, “[t]rial counsel will be deemed withdrawn upon appointment of counsel on review.”
7 Attachment A at 1. I was notified by email on October 20th, 2012 that Lise Ellner was assigned
8 by the Office of Public Defense to handle Mr. Barnes’ appeal. Attachment B at 1.

9 On May 13th, 2013, after reviewing the decision issued in *State v. Coristine*, 177 Wn.2d
10 370, 300 P.3d 400 (2013), I wrote an email to Ms. Ellner asking her if she believed that in light
11 of *Coristine*, Barnes would be quickly reversed. Attachment B at 3. At the time, I believed no
12 further explanation was necessary – although *Coristine* involved a charged of Rape in the
13 Second Degree via a violation of RCW 9A.44.050(1)(b) rather than (1)(a) as was alleged
14 against Barnes, the legal conclusions struck me as clearly applicable to the facts of Mr. Barnes’
15 case. I recall that Mr. Gasnick specifically argued to the trial judge during the Barnes trial that
16 the court should not force Mr. Barnes to adopt an affirmative defense when Mr. Barnes
17 produced evidence of consent merely to negate the element of forcible compulsion the State
18 was required to prove beyond a reasonable doubt.

19 I did not receive a response to my May 13th, 2013 inquiry from Ms. Ellner.

20 On September 19th, 2013 the Washington Supreme Court decided *State v. Lynch*. This
21 confirmed that the reasoning in *Coristine* applied to forcible compulsion as well.

22 I received a letter from Mr. Barnes on October 11th, 2013 with a request for certain
23 documents in order to assist Mr. Barnes in preparation of his *pro se* statement of additional
24
25

1 grounds for his appeal. In reviewing Mr. Barnes' request, I inferred that he was attempting to
2 raise issues that were addressed in *Coristine* and *Lynch*.

3 In preparation for a response to Mr. Barnes' letter, I asked Mr. Gasnick to check and see
4 if Ms. Ellner had raised the issue of unwanted affirmative defenses forced on Mr. Barnes (the
5 *Coristine* and *Lynch* issues) in her appeal or in a statement of additional grounds or
6 supplemental brief. Mr. Gasnick reported to me that he could not find any evidence that this
7 issue had been raised, but he did notice the trial clerk's notes incorrectly indicated we had not
8 objected to any of the State's instructions. I emailed Ms. Ellner, copying in Mr. Gasnick, and
9 informed her that I believed we had carefully preserved this issue during trial, and if she relied
10 on the clerk's notes in deciding not to raise it, she should review the transcripts instead.
11

12 Attachment C at 1.

13 In response to my email of Friday, October 11th, Ms. Ellner replied on Sunday, October
14 13th, attaching a brief she indicated she prepared that addressed *Lynch*. Attachment D. I
15 reviewed her brief and inferred she had sent me what I very strongly suspected was a brief
16 prepared for another case and modified slightly to apply to Mr. Barnes' facts. I came to this
17 conclusion because the brief indicated it was on appeal from Lewis County, (the trial occurred
18 in Clallam County) and the assignments of error indicated that "Miller's" rights were violated,
19 not Mr. Barnes'. Attachment D. In addition, it appears that Ms. Ellner was, or should have
20 been aware of Mr. Barnes' preservation of this issue prior to my email, as the objections at the
21 trial court were cited as a report of the proceedings page 488 only two days after my email.
22

23 Attachment D.

24 On October 13th, 2013, after reading Ms. Ellner's rough draft, I replied to Ms. Ellner
25 that I had read her brief and pointed out several errors that I immediately noticed when I read it.

1 Attachment C at 5. At the time of my reply I believed Ms. Ellner understood the issue, as she
2 had cited from the transcript an objection to instruction number 12 indicating that consent was,
3 “pretty much an element of all of the charges here.” Attachment D. I did not receive a final
4 draft of Ms. Ellner’s brief.

5 I know from my participation in Mr. Barnes’ trial that the only evidence that would
6 support Mr. Barnes’ conviction for Burglary in the First Degree with a finding of Sexual
7 Motivation was the allegation that one of the Rapes in the Second Degree occurred in the
8 residence of Kenneth Johnson. Mr. Johnson had allowed Mr. Barnes to rent a room in Mr.
9 Johnson’s residence, but there was testimony from Mr. Johnson during the trial that Mr. Barnes
10 had failed to pay rent and was no longer welcome in the residence when the sexual contact
11 between Mr. Barnes and the alleged victim, Christina Russell, occurred at Mr. Johnson’s
12 residence. In other words, the only evidence to support the Burglary in the First Degree with
13 the finding of Sexual Motivation was that Mr. Barnes had committed a Rape inside a building
14 he was alleged to not have lawful authority to be inside.

15
16 It was not until I read the unpublished decision *State v. Barnes*, 2014 Wash. App.
17 LEXIS 1498, 2014 WL 2795968 (2014), in June of 2014 that I realized the Court of Appeals
18 was not presented with any effective argument by Ms. Ellner that the only evidence that Mr.
19 Barnes engaged in an assault with sexual motivation was the evidence that he had committed
20 rape. If the jury may have improperly concluded Mr. Barnes committed rape by forcible
21 compulsion because the burden to prove consent was improperly shifted to Mr. Barnes, then for
22 the exact same reason, the jury may have improperly concluded that Mr. Barnes engaged in
23 assault with a sexual motivation because the burden to prove the contact with Ms. Russell was
24 unwanted, and thus harmful or offensive, was improperly shifted to Mr. Barnes by the same
25

1 consent instruction. Although the court did perform an analysis of the elements of Burglary in
2 the First Degree with Sexual Motivation, it seems only to have considered the elements related
3 to entering or remaining unlawfully and not whether there was evidence to support an assault
4 with sexual motivation. *Id* at 23-5. The opinion states that this is because Mr. Barnes only
5 challenged the sufficiency of the conviction as it related to Mr. Barnes entering or remaining
6 unlawfully. *Id* at 22.

7
8 I can think of no strategic reason why Ms. Ellner failed to ask the Court of Appeals and
9 then the Washington Supreme Court to reverse Mr. Barnes' conviction for Burglary in the First
10 Degree with Sexual Motivation. The burglary conviction, because of the sexual motivation
11 enhancement, requires a defendant to receive an indeterminate sentence under RCW 9.95, *et*
12 *seq.*, as did the Rape in the Second Degree convictions. Both the burglary and rape convictions
13 were predicated on jury instruction 12, which stated that Mr. Barnes had to establish a defense
14 of consent by a preponderance of the evidence. At trial during closing argument the State
15 argued that Mr. Barnes raped Ms. Russell, and therefore he committed an assault with sexual
16 motivation. At trial during closing argument the defense argued that Mr. Barnes had not raped
17 Ms. Russell, and therefore he had not committed an assault.

18
19 In July of 2014 Mr. Gasnick asked Ms. Ellner if she intended to pursue further relief on
20 behalf of Mr. Barnes. Mr. Gasnick informed me that Ms. Ellner had terminated her
21 representation of Mr. Barnes because Ms. Ellner had concluded that seeking further review of
22 the Burglary First Degree conviction was likely to be without merit. Attachment E.

23
24 I subsequently prepared this declaration at the request of Corean Barnes to detail the
25 actions of his appellate attorney, Lise Ellner.

1 I, Alex Stalker hereby certify under penalty of the laws of the State of Washington that
2 the above is true and correct based on information and belief.

3 Signed this Friday, April 03, 2015 in Port Angeles, WA.

4 
5 _____
6 ALEX STALKER WSBA 38677

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ATTACHMENT A

SCANNED - 2

**SUPERIOR COURT OF WASHINGTON
FOR CLALLAM COUNTY**

STATE OF WASHINGTON
Plaintiff

vs.
COREAN O. BARNES
Defendant.

FILED
CLALLAM CO CLERK

2017 OCT 16 A 10:18

BARBARA CHRISTENSEN

NO. 08-1-00340-9
ORDER OF INDIGENCY

THIS COURT FINDS that the defendant lacks sufficient funds to prosecute an appeal and that applicable law grants the defendant a right to review at public expense to the extent defined in this ORDER;

The Court Orders as follows:

1. The defendant is entitled to counsel for review wholly at public expense;
2. Division II of the Court of Appeals shall appoint counsel for review. Appointed counsel may be assisted by counsel in the same firm as appointed counsel. Trial counsel will be deemed withdrawn upon appointment of counsel on review;
3. The defendant is entitled to the following at public expense:
 - A. Those portions of the verbatim report of proceedings reasonably necessary for review as follows: to be determined by appointed counsel;
 - B. A copy of the following clerk's papers: to be determined by appointed counsel;
 - C. Preparation of original documents to be reproduced by the clerk as provided in Rule 14.3(b).

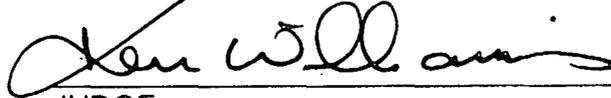
ORDER OF INDIGENCY

cc-KL

D. Reproduction of briefs and other papers on review which are reproduced by the clerk of the appellate court;

E. Other items: To be determined by appellate counsel.

DONE IN OPEN COURT this 16th day of October, 2012.



JUDGE

Presented by:

CLALLAM PUBLIC DEFENDER



ALEX STALKER
Attorney for Defendant

WSBA 38677

Copy received

(Deputy) Prosecuting Attorney

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ATTACHMENT B



Alex Stalker <alexstalker@gmail.com>

Corean Barnes 08-1-00340-9

9 messages

Debbie Coplen <Debbie.Coplen@opd.wa.gov>

Sat, Oct 20, 2012 at 12:29 PM

Reply-To: Debbie Coplen <Debbie.Coplen@opd.wa.gov>, Sean Flynn <Sean.Flynn@opd.wa.gov>

To: "alexstalker@gmail.com" <alexstalker@gmail.com>

Cc: Lise Ellner <liseellnerlaw@comcast.net>

Dear Alex Stalker:

Case No.: 08-1-00340-9

Case Name: State v. Corean Barnes

COA No.: 44075-0-II

Attorney Lise Ellner has been designated by OPD in the above appeal. Continuity of representation is a very important aspect of appellate practice. As trial counsel in this case, OPD would greatly appreciate your availability to Ms. Ellner in preparing the record for review and other issues related to this case. You can expect to be contacted by Ms. Ellner soon. Her contact information is listed below. Thank you for your cooperation.

Lise Ellner

PO Box 2711

Vashon, WA 98070-2711

(206) 463-6757

Liseellnerlaw@comcast.net

*Sent on behalf of:**Sean Flynn, Appellate Program Manager**Washington State Office of Public Defense**(360) 586-3164 ext. 104**Sean.Flynn@opd.wa.gov*

Lise Ellner <liseellnerlaw@comcast.net>

Thu, Apr 11, 2013 at 8:38 PM

To: alexstalker@gmail.com

Hello Mr. Stalker:

I am appellate counsel for Mr. Barnes, whom you represented at the trial level. I am in the middle of reviewing the record and do not seem able to locate a copy of VPR of the redacted recording between Ms. Russell and Mr. Barnes. I would be grateful if you could email me a copy. I must say that you did a very good job at trial preserving the record. Thank you. Lise

From: Debbie Coplen [mailto:Debbie.Coplen@opd.wa.gov]
Sent: Saturday, October 20, 2012 12:30 PM
To: alexstalker@gmail.com
Cc: Lise Ellner
Subject: Corean Barnes 08-1-00340-9

[Quoted text hidden]

Alex Stalker <alexstalker@gmail.com>
To: Lise Ellner <liseellnerlaw@comcast.net>

Thu, Apr 11, 2013 at 9:45 PM

I'll see if I can dig you up a copy. We're kind of a low tech operation and it might be easier to just mail you a physical copy. What is your mailing address?

-Alex

[Quoted text hidden]

Lise Ellner <liseellnerlaw@comcast.net>
To: Alex Stalker <alexstalker@gmail.com>

Fri, Apr 12, 2013 at 11:10 AM

Thank you.

Lise Ellner

PO Box 2711

Vashon, WA 98070

From: Alex Stalker [mailto:alexstalker@gmail.com]
Sent: Thursday, April 11, 2013 9:46 PM
To: Lise Ellner
Subject: Re: FW: Corean Barnes 08-1-00340-9

[Quoted text hidden]

Alex Stalker <alexstalker@gmail.com>
To: Lise Ellner <liseellnerlaw@comcast.net>

Fri, Apr 12, 2013 at 11:50 AM

I am mailing you a copy of the transcript the jury was shown of the redacted recording made by Ms. Russell of Mr. Barnes. If you want a copy of the audio recording in order to get a sense of how things actually sounded, I could get you that as well. (Although I don't have a redacted version of the audio; only the unredacted version.) The transcript is quite accurate for most of the recording (although you can sometimes make out a few words that are listed as ____ on the transcript).

If you need anything else please let me know.

-Alex Stalker

[Quoted text hidden]

Lise Ellner <liseellnerlaw@comcast.net>
To: Alex Stalker <alexstalker@gmail.com>

Fri, Apr 12, 2013 at 1:35 PM

The transcript is all that I need. Thank you very much. Lise

From: Alex Stalker [mailto:alexstalker@gmail.com]
Sent: Friday, April 12, 2013 11:50 AM

[Quoted text hidden]

[Quoted text hidden]

Alex Stalker <alexstalker@gmail.com>
To: Lise Ellner <liseellnerlaw@comcast.net>

Mon, May 13, 2013 at 12:38 PM

In light of State v. Cristine, do you expect Barnes will be fast tracked for reversal?

-Alex Stalker

[Quoted text hidden]

Alex Stalker <alexstalker@gmail.com>
To: Harry Gasnick <gasnickcpd@olypen.com>

Fri, Oct 11, 2013 at 4:45 PM

FYI

----- Forwarded message -----

From: **Alex Stalker** <alexstalker@gmail.com>
Date: Mon, May 13, 2013 at 12:38 PM
Subject: Re: FW: Corean Barnes 08-1-00340-9
[Quoted text hidden]

Alex Stalker <alexstalker@gmail.com>
To: Harry Gasnick <gasnickcpd@olypen.com>

Thu, Oct 30, 2014 at 3:21 PM

I'm forwarding you the forward of the last time I forwarded this to you.

I mentioned Cristine to Ellner May 2013. Lynch was not mentioned to her until Lynch was decided later that year.

-Alex

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ATTACHMENT C



Alex Stalker <alexstalker@gmail.com>

Corean Barnes

7 messages

Alex Stalker <alexstalker@gmail.com>
To: Lise Ellner <liseellnerlaw@comcast.net>
Bcc: Harry Gasnick <gasnickcpd@olypen.com>

Fri, Oct 11, 2013 at 4:52 PM

Ms. Ellner;

After receiving a letter from Mr. Barnes recently, it has come to my attention that you may not have raised as an issue in Mr. Barnes' case the consent instruction that was given. (Instruction No. 12). It has further come to my attention that the clerks notes reflect that no objections to the instructions were made.

I believe the clerk's notes are incorrect. My recollection is that co-counsel, Mr. Gasnick and I made several arguments regarding instruction 12 that were consistent with the objections made in *State v. Cristine*, 117 Wn.2d 370, and *State v. Lynch*, 2013 Wash. LEXIS 764. If you have not done so, I would urge you to listen to the record regarding objections and exceptions to the jury instructions.

Sincerely,

-Alex Stalker

Lise Ellner <liseellnerlaw@comcast.net>
To: Alex Stalker <alexstalker@gmail.com>

Sun, Oct 13, 2013 at 12:05 PM

Thank you for the note. When I filed the brief Gregory controlled and did not provide a challenge to the instruction. Three weeks ago the Court issued Lynch which is on point and basically overrules *Gregory*. The brief is attached. Lise

From: Alex Stalker [mailto:alexstalker@gmail.com]
Sent: Friday, October 11, 2013 4:52 PM
To: Lise Ellner
Subject: Corean Barnes

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Sincerely,

-Alex Stalker



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Alex Stalker <alexstalker@gmail.com>
To: Harry Gasnick <gasnickcpd@olyphen.com>

Sun, Oct 13, 2013 at 12:25 PM

FYI.

-Alex

----- Forwarded message -----

From: **Lise Ellner** <liseellnerlaw@comcast.net>
Date: Sun, Oct 13, 2013 at 12:05 PM
Subject: RE: Corean Barnes
To: Alex Stalker <alexstalker@gmail.com>

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To: Harry Gasnick <gasnickcpd@olypen.com>

Sun, Oct 13, 2013 at 12:45 PM

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I noticed there are a couple typos while I was reading the brief. If you've already corrected these because you sent me an old draft, then never-mind.

Cover page - the trial was in Clallam County, not Lewis County.

P1 - Assignments of error - You left "Miller" in a couple places and have not replaced it with "Barnes"

P1 - Statement of the case - You wrote "Mr." instead of "Mr. Barnes"

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P4 - You forgot to indent your first paragraph.

P5 - In the first partial paragraph at the top of the page, Barnes should be Barnes'.

-Alex Stalker

On Sun, Oct 13, 2013 at 12:25 PM, Alex Stalker <alexstalker@gmail.com> wrote:
FYI.

-Alex

----- Forwarded message -----

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Date: Sun, Oct 13, 2013 at 12:05 PM

Subject: RE: Corean Barnes

To: Alex Stalker <alexstalker@gmail.com>

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Sent: Friday, October 11, 2013 4:52 PM

To: Lise Ellner

Subject: Corean Barnes

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Sincerely,

-Alex Stalker

Alex Stalker <alexstalker@gmail.com>
To: Harry Gasnick <gasnickcpd@olypen.com>

Sun, Oct 13, 2013 at 12:45 PM

Oops, that should have gone to Ellner.

-Alex

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Sincerely,

-Alex Stalker

Alex Stalker <alexstalker@gmail.com>
To: Harry Gasnick <gasnickcpd@olypen.com>

Wed, Mar 19, 2014 at 4:57 PM

FYI again.

-Alex

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From: **Alex Stalker** <alexstalker@gmail.com>
Date: Sun, Oct 13, 2013 at 12:25 PM
Subject: Fwd: Corean Barnes
To: Harry Gasnick <gasnickcpd@olypen.com>

FYI.

-Alex

----- Forwarded message -----

From: **Lise Ellner** <liseellnerlaw@comcast.net>
Date: Sun, Oct 13, 2013 at 12:05 PM
Subject: RE: Corean Barnes
To: Alex Stalker <alexstalker@gmail.com>

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-Alex Stalker

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ATTACHMENT D

NO. 44075-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COREAN BARNES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY.

The Honorable Kenneth William Judges

SUPPLEMENTAL BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
P.O. BOX 2711
VASHON, WA 98070

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 THE TRIAL COURT VIOLATED BARNES' SIXTH AMENDMENT RIGHT TO CONTROL HIS DEFENSE BY GIVING A "CONSENT" IJURY INSTRUCTION OVER HIS OBJECTION.2	
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FEDERAL CASES

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422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....3

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Sixth Amendment, United States Constitution.....ad passim

11 *Washington Practice: Washington Pattern
Jury Instructions Criminal* 18.25 (3d ed. 2011).....5, 6

A. ASSIGNMENT OF ERROR

The trial court violated Miller's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Miller's objections.

Issue Pertaining to Assignment of Error

Did the trial court violate Miller's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Miller's objections?

B. STATEMENT OF THE CASE

Relevant Facts

Mr. incorporates by reference the facts set forth in his opening and reply briefs.

Over defense objection, the trial gave the following "consent" instruction:

A person is not guilty of rape in the second degree if the *sexual intercourse* is consensual. Consent means that at the time of the act of *sexual intercourse* there are actual words or conduct indicating freely given agreement to have *sexual intercourse*.

The defendant has the burden of proving that the *sexual intercourse* was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the

defendant has established this defense, it will be your duty to return a verdict of not guilty *[as to this charge]*

RP 488; CP 61; WPIC 18.25.

C. ARGUMENT

THE TRIAL COURT VIOLATED
BARNES' SIXTH AMENDMENT RIGHT
TO CONTROL HIS DEFENSE BY
GIVING A "CONSENT" INSTRUCTION
OVER HIS OBJECTION.

Barnes objected to the "consent" jury instruction number 12 because it created an unwanted shifting of the burden of proof to the defense. RP 488.

I'd object to instruction number 12, forcing consent instruction on us when it's not requested and the evidence regarding consent basically would be relevant as to whether or not there was forcible compulsion. Additionally, I know the Court has said they took some precautions since it's pretty much an element of all of the charges here, but I think frankly it's going to be extremely confusing to a jury when what happened, who's (sic) burden it is, and who has to prove consent when. So, I'd object to instruction number 12

RP 488.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Under the Sixth Amendment, a criminal defendant has the implicit right to control his defense. *State v. Lynch*, 87882-0 (September 19, 2013), at page 6 *citing*, *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This Court reviews constitutional violations de novo. *Id.*

“Instructing the jury on an affirmative defense over the defendant’s objection violates the Sixth Amendment by interfering with the defendant’s autonomy to present a defense.” *Lynch*, *quoting*, *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013). In *Coristine*, the defendant, charged with second degree rape of a person incapable of consent, argued that the state failed to prove the victim’s inability to consent. *Coristine*, 177 Wn.2d at 375. Coristine objected to the instruction because he did not want the burden of proving lack of consent. *Coristine*, 177 Wn.2d at 374.

Over Coristine’s objection, the trial court gave a “reasonable

belief” instruction. The Supreme Court reversed the trial court and the Court of Appeals, and held that “[i]mposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges.” *Coristine*, 177 Wn.2d at 377.

Four months later the Supreme in *Lynch* gave the identical “consent” instruction objected to in Barnes’ case. *Lynch*, at page 8. *Lynch*, like Barnes objected to the instruction and directed his cross-examination of witnesses in a manner designed to undermine the state’s ability to prove forcible compulsion. RP 5-9; *Lynch*, at page 8 The Court in *Lynch*, citing, *Corisitne*, held that the use of the consent instruction “on an unwilling defendant,” “impinge[d]” *Lynch*'s autonomy to conduct his defense. *Coristine*, 177 Wn.2d at 377.

These cases control the outcome of this case. As in *Lynch*, the use of the consent instruction over defense objection violated Barnes’ Sixth Amendment right to control his defense.

In both *Lynch* and *Coristine*, the Supreme Court rejected the state’s argument that the instruction was justified because the defendants introduced evidence of consent. *Lynch*, at page 8; *Coristine*, 177 Wn .2d at 377. The same reasoning applies to Mr. Barnes case. Even though Barnes introduced evidence of consent,

this evidence did not justify the instruction on consent; the instruction violated Barnes Sixth Amendment right to control his defense.

The error was not harmless because prejudice is presumed when the error is of constitutional magnitude; and the state bears the burden of proving it was harmless beyond a reasonable doubt. *Lynch, citing, Coristine*, 177 Wn .2d at 380.

In *Lynch*, the Supreme Court considering the same consent instruction given in in Barnes' case, held that the error was not harmless because "a deprivation of [a defendant's right to control his defense] is error even if the trial court's" consent instruction was an accurate statement of the law. *Lynch*, quoting, *Coristine*, 177 Wn.2d at 381. The Court also held that "if seizing control over a defendant's trial strategy were harmless so long as the court correctly instructed the jury in the defense it chose, little would remain of the Sixth Amendment right to control one's defense." *Id.*

The consent instruction given in Barnes and in *Lynch* was an accurate statement of the law derived from 11 *Washington Practice: Washington Pattern Jury Instructions Criminal* 18.25 (3d ed. 2011).

Prior to *Lynch* the Supreme Court in *State v. Gregory*, 158

Wn. 2d 759, 801, 147 P. 3d 1201 (2006) approved the same instruction under a similar fact pattern. Since *Lynch*, however, giving such an instruction over the defendant's objection violates the defendant's right to control his defense, regardless of the instruction's accuracy. *Lynch* at page 9.

According to *Lynch*, the giving of the instruction in Barnes' case was prejudicial error requiring reversal and remand for a new trial.

D. CONCLUSION

Mr. Barnes respectfully requests this Court reverse his conviction and remand for a new trial for violation of his Sixth Amendment right to control his defense.

DATED this 13th day of October 2013

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office lschrawyer@co.clallam.wa.us; and Corean Barnes DOC# 317817 Airway heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on October 13, 2013. Service was made by electronically to the prosecutor and to Mr. Carter by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

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ATTACHMENT E

Subject: Re: barnes
From: Harry Gasnick <gasnickcpd@olypen.com>
Date: 7/22/2014 4:11 PM
To: Lise Ellner <liseellnerlaw@comcast.net>
CC: Alex Stalker <astalkercpd@olypen.com>

L

As a follow-up/confirmation of our conversation of yesterday, I understand your representation of Mr. Barnes to be over and that you have no objections to my office consulting with him regarding his case. I also understand that although Mr. Barnes had asked you to file a motion for discretionary review, such motion will not be filed by you based on your analysis of the lack of prospective merit of such motion(s)...I also understand you have advised Mr. Barnes of this.

Mr. Barnes called me to find out if there was any negotiating leverage he may have along the lines of refraining from pursuing further post-conviction action actions on his behalf in exchange for favorable resolution of the soon to be remanded charges, with an eye towards obtaining some sort of credit for time served resolution.

Although I agree this was something of which he was advised by our office and you, I don't think he realized (or he forgot) that his sentence under the burglary charge is also under the indeterminate sentence act.

I appreciate your analysis that restraint from post-conviction litigation may not be the strongest leverage in the world, especially in light of your analysis of the lack of merit of the issues Mr. Barnes wishes to pursue, and will take that into account when advising him in an anticipated telephone call next week.

Thanks.

hg

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On 7/21/2014 11:31 AM, Lise Ellner wrote:

Hi Mr. Gasnick:

Just called your office and left a message. I am attaching the COA case event log so that you can see the case status- it is over and my representation ended. Call if you have any questions. Lise

From: Harry Gasnick [<mailto:gasnickcpd@olypen.com>]

Sent: Monday, July 21, 2014 10:31 AM

To: Lise Ellner

Subject: barnes

Ms. Ellner

Mr. Barnes called me today.

His questions were tied in to the status of his appeal/post conviction actions

Please advise as to the status of his case and your current role in representation of Mr. B.

If you don't mind, I'd prefer telephonic contact to e-mail so there can be follow-up questions etc without time lag

thanks

harry gasnick

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Harry Gasnick <gasnickcpd@olypen.com>

Director

Clallam Public Defender

Attachments:

gasnickcpd.vcf

256 bytes